STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JEFF BOGER, JR., Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JEFF BOGER, SR.,

Respondent-Appellant.

UNPUBLISHED
October 14, 2003

No. 246682
Luce Circuit Court
Family Division
LC No. 01-003078-NA

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(c)(*i*), (g) and (j). We affirm in part and remand for further proceedings.

We first address respondent's argument that the trial court erroneously failed to treat the child as an Indian child under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.* We disagree.

During the early stages of this case, efforts were made to investigate the child's possible Indian heritage because respondent believed that the child was eligible for membership in either the Blackfeet Tribe of Montana or a Cherokee tribe. Petitioner notified the Bureau of Indian Affairs, who in turn notified the Blackfeet Tribe and three Cherokee tribes. Two of the Cherokee tribes responded by stating that the child was not eligible for membership. The third Cherokee tribe did not respond. The Blackfeet Tribe stated that it needed more information to make a decision. Petitioner attempted to acquire further information from respondent, but he was not able to provide the relevant information to establish that the child was a Native American Indian. Accordingly, at the termination hearing, the trial court applied the "clear and convincing"

evidence standard, MCR 5.974(F)(3),[1] rather than the heightened standards applicable to Indian children. See MCR 5.980(D).

The ICWA provides specific procedures and standards that are to be followed when a state attempts to remove Indian children from their families. *In re IEM,* 233 Mich App 438, 443; 592 NW2d 751 (1999). 25 USC 1903(4) defines an "Indian child" as follows:

> [A]ny unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe; . . . .

The ICWA includes specific notice procedures, see 25 USC 1912(a), which have been incorporated into MCR 5.980(A)(2):

> *(A) Notice; Transfer.* If any Indian child as defined by the Indian Child Welfare Act, 25 USC 1901 et seq. is the subject of a protective proceeding . . ., the following procedures shall be used:
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> * * *
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> (2) If the child does not reside on a reservation, the court shall ensure that the petitioner has given notice of the proceedings to the child's tribe and the child's parents or Indian custodian and, if the tribe is unknown, to the Secretary of the Interior.

See also MCR 5.965(B)(7). If the tribe intervenes and requests that the matter be transferred to the tribal court, the court is required to transfer the case unless a parent objects or good cause is shown not to transfer the matter. MCR 5.980(A)(3).

Once notice is provided to the appropriate tribe, it is for the tribe to decide if the child, or the parent, qualifies as an "Indian child." *In re IEM, supra* at 447-448; *In re Shawboose,* 175 Mich App 637, 639; 438 NW2d 272 (1989). "If proper notice is provided and a tribe fails to either respond or intervene in the matter, the burden shifts to the parties (i.e., the parents) to show that the ICWA still applies." *In re TM (After Remand),* 245 Mich App 181, 187; 628 NW2d 570 (2001).

Here, the trial court complied with the notice requirements, and the tribes who were contacted failed to intervene. Although the Blackfeet tribe requested additional information, the record discloses that petitioner did all it could to attempt to obtain as much information as possible from respondent, who ultimately could not provide sufficient information to establish the child's eligibility for membership with the Blackfeet Tribe. Because the child's status as an

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[1] The court rules for child protective proceedings were amended and recodified as part of new MCR subchapter 3.900, effective May 1, 2003. This opinion refers to the rules in effect at the time of the trial court's decision.

"Indian child" under the ICWA was never established, the trial court did not err by failing to apply the heightened standards applicable to Indian children.

Next, respondent challenges the trial court's determination that §§ 19b(3)(c)(*i*), (g) and (j) were each established. This Court reviews a trial court's findings of fact in a parental termination case under the clearly erroneous standard. *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003); MCR 5.974(I). A finding of fact is clearly erroneous when the reviewing court has a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Deference must be accorded to the trial court's assessment of the credibility of the witnesses before it. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991).

The burden of proof is on the petitioner to prove a statutory ground for termination by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Once that burden is met, pursuant to MCL 712A.19b(5), "the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo, supra* at 354. The court should decide the "best interests" question based upon all of the evidence presented and without regard to which party produced the evidence. *Id*. at 352-354. The court's decision regarding the child's best interests is also reviewed for clear error. *Id*. at 356-357.

The court terminated respondent's parental rights under §§ 19b(3)(c)(*i*), (g), and (j), which provide as follows:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *
>
> (c) The parent was a respondent in a proceeding brought under this chapter, 182 days or more have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
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> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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> * * *
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
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> * * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Only one statutory ground need be established to terminate parental rights, *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991), and the court did not clearly err in finding that §§ 19b(3)(g) and (j) were each proven by clear and convincing evidence.

The evidence discloses that respondent has intellectual limitations that affect his ability to exercise sound judgment and process information. He was not able to sufficiently demonstrate that he could properly care for his child, who has special needs. Furthermore, respondent has had problems with his mental health and substance abuse that require continuing treatment. It was clear that respondent could not properly care for his son without significant assistance, and that neither petitioner, nor respondent's girlfriend, could provide the amount of assistance that respondent requires. Termination was appropriate under both § 19b(3)(g) and (j). Although the trial court did not specifically mention the child's age in its findings, it is apparent that age was not a factor in its decision.

Although the trial court did not clearly err in finding that a statutory ground for termination was proven by clear and convincing evidence, the court appears to have applied an incorrect legal standard in its consideration of the child's "best interests." In discussing the child's best interests, the trial court stated:

> Based on all of the foregoing the Court does find, strike that, the Court does not find that termination of the parental rights of the respondent would clearly not be in the best interest of the child. In a rough sense, the evidence on both sides of the best interest question washes out. While there may be a preponderance of the evidence one way or the other, the Court does not find termination of parental rights to be clearly in the child's best interest, that might be state incorrectly. No that's correct. The Court does not find termination of parental rights to be clearly in the child's best interest or clearly contrary to the child's best interest. It is simply not clear to the Court either way. *If the burden of proof were still upon the petitioner, as it was years ago by law, the Court would not be able to terminate the respondent's parental rights. Because the law has been changed so that the burden of proof is now on the respondent to show that termination of parental rights is clearly not in the child's best interest, the Court under the court rule shall, as mandated, order termination of parental rights.* [Emphasis supplied.]

The trial court erroneously stated that the burden of proof was on respondent to show that termination of his parental rights was clearly not in the child's best interests.

Before January 1, 1995, once a statutory ground was proven, the ultimate decision whether to terminate parental rights was discretionary with the trial court, taking into consideration the best interests of the child. *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). Effective January 1, 1995, subsection (5) was added to MCL 712A.19b. That subsection provides:

> (5) If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interests.

In a series of cases beginning with *In re Hall-Smith*, 222 Mich App 470, 471-473; 564 NW2d 156 (1997), this Court held that § 19b(5) created a mandatory presumption in favor of termination that could be rebutted only by a showing that termination of a respondent's parental rights was not in the child's best interests. Additionally, in *In re Hall-Smith, supra* at 473, this Court held that, under § 19b(5), the respondent had the burden of going forward with evidence to show that termination of parental rights was not in the child's best interests. The Court stated that "[a]bsent any evidence addressing this issue by the parent, termination of parental rights is mandatory." *Id*.

In *In re Boursaw*, 239 Mich App 161, 180; 607 NW2d 408 (1999), this Court stated:

> If the parent does not put forth any evidence addressing the issue, termination is automatic. *In re Hall-Smith, supra* at 473. If, however, the parent does put forth such evidence, the mandatory presumption in favor of termination is lifted, and the party seeking termination must then again meet its burden of proof with regard to the matter.

In *In re Trejo, supra* at 350-354, our Supreme Court considered § 19b(5) and rejected the interpretations of this subsection by *In re Hall-Smith* and *In re Boursaw*. The Court in *In re Trejo*, stated:

> While we acknowledge *Hall-Smith's* attempt to give meaning to the mandatory language of subsection 19b(5), we reject the notion that the best interest clause of subsection 19b(5) imposes a burden of production on the party opposing termination. Nor does the best interest provision of subsection 19b(5) impose any further burden of proof on the petitioner once the petitioner has carried its burden of establishing one or more grounds for termination.
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> Subsection 19b(5) unambiguously provides that once the petitioner proves at least one ground for termination by clear and convincing evidence, the court "shall order termination." Absent any further language, the statute would create a legally binding rule. However, reading subsection 19b(5) in its entirety, we conclude that subsection 19b(5) preserves to the court the opportunity to find that termination is "clearly not in the child's best interests" despite the establishment of one or more grounds for termination.
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> We reject *Hall-Smith's* characterization of subsection 19b(5) as creating a rebuttable presumption, because the plain language of subsection 19b(5) does not expressly assign any party the burden of producing best interest evidence. Although *Hall-Smith* and its progeny specifically require the parent to put forth some evidence that termination is clearly not in the child's best interest, subsection 19b(5) does not specify that it is the parent who carries the burden of

> producing best interest evidence opposing termination. While we recognize that the party opposing the established grounds for termination will almost always be a parent, we hold that under subsection 19b(5), the court may consider evidence introduced by any party when determining whether termination is clearly not in a child's best interest. Further, even where no best interest evidence is offered after a ground for termination has been established, we hold that subsection 19b(5) permits the court to find from evidence on the whole record that termination is clearly not in a child's best interests. Thus, we expressly reject the dicta of *In re Boursaw*, 239 Mich App 161, 180; 607 NW2d 408 (2000) [sic, (1999)], that, "[i]f the parent does not put forth any evidence addressing the issue [of the child's best interests], termination is automatic."
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> Subsection 19b(5) attempts to strike the difficult balance between the policy favoring the preservation of the family unit and that of protecting a child's right and need for security and permanency. While the operation of subsection 19b(5) imbues the court with some discretion, that discretion is significantly diminished from the prior law, which permitted the court to not terminate, even where at least one ground for termination was established. Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests. [*In re Trejo Minors, supra* at 352-354. Footnotes omitted.]

In this case, the trial court carefully and at length reviewed the evidence relevant to the best interests determination. While we are constrained to conclude that the evidence as recited by the trial judge and as it appears in the record clearly supports a finding that termination is in the child's best interest, the court reached that conclusion only reluctantly and with reservations; this is a factual finding for the trial court to make. Most importantly, however, the trial court's comments suggest that it erroneously believed that the burden of proof was on respondent with respect to the "best interest" question. This clearly is no longer the law, nor was it so at the time the trial court made its decision. Accordingly, we remand this matter to the trial court for reconsideration of the child's best interests in light of *In re Trejo, supra*. In order to facilitate an expeditious resolution of this case, we retain jurisdiction so that we may evaluate the trial court's renewed findings and best interest determination under the appropriate legal standard.

Affirmed in part and remanded for further proceedings consistent with this opinion. The trial court is directed to conduct further proceedings within 28 days of the issuance of this opinion, and to issue its opinion and/or order within 14 days after completion of the proceedings. We retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Christopher M. Murray